United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7255

United States Court of Appeals

FOR THE SECOND CIRCUIT

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B/S

JOHN THEODORE GILBERT,

Plaintiff-Appellant,

against

AMERICAN EAGLE TANKER CORP.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Defendant-Appellee
96 Fulton Street
New York, New York 10038
(212) 233-6171

ROBERT J. RYNIKER
Of Counsel

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Plaintiff-Appellant,

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AMERICAN EAGLE TANKER CORP.,

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BRIEF FOR DEFENDANT-APPELLEE

Issues Presented for Review

The first issue presented for review is whether the court below was correct in holding that there was no failure on the part of the Defendant-Appellee (hereinafter referred to as the "Shipowner") to pay wages so as to make it liable for the double wage penalty as provided in 46 U.S.C. Sec. 596. The court held that at the time the Plaintiff-Appellant (hereinafter referred to as "Gilbert") left the vessel he was given, pursuant to his request, $2,000 in cash and a voucher for the balance of his wages. The court held that subsequent to his leaving the vessel, he had made no attempt to collect the balance of his wages from the Shipowner (A 230).* The court held that despite Gilbert's claim that he remained in New York from July, 1972 until May, 1973 trying to get paid, Gilbert never went to the

*"A" refers to pages in the joint appendix.

Shipowner's office in New York with his voucher to collect the balance due. This was so despite the fact that he had been told by his union to present the voucher to the Shipowner to receive the balance of his wages (A 230).

The other issues presented for review are whether the court below was clearly erroneous in holding that Gilbert's overtime claim had been settled between his union's representative and the Shipowner after an exchange of correspondence and several conferences between the union's representative and the Shipowner (A 230).

The final issue for review by this court is whether the court below committed reversible error in omitting to grant Gilbert judgment for the balance of his wages which were at all times concededly due and owing and which Gilbert concedes were paid in full subsequent to the entry of judgment in the court below (Brief,* p. 9).

Statement of the Case

Gilbert was hired by the Shipowner as a vacation relief Second Assistant Engineer on the S.S. AMERICAN EAGLE out of his New York union hall on December 28, 1971 (A 74). His term of employment was such that when the regular engineer's vacation was over his term of employment was completed (A 74). New York was the port of engagement and Gilbert was flown from New York to join the vessel in Ras Tanura, Saudi Arabia, arriving on December 29, 1971 at about 11:30 P.M. (A 75).

Gilbert served continuously on the vessel while it was trading away from the United States. On May 18, 1972 Gilbert was given a voucher worksheet (Ex.** C, A 202) showing wages due, overtime, tax information and other details and was told that the regular engineer was returning to

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* The references to "Brief" refer to Appellant's main brief.

** Ex. refers to Exhibits in the joint appendix.

the vessel on May 20, 1972 when the S.S. AMERICAN EAGLE was to arrive in the port of Ras Tanura (A 86-7; 122-3; 228-9). The S.S. AMERICAN EAGLE had been out of the United States and operating in the Far East for approximately two to two and a half years prior to May, 1972 (A 117). The vessel was on charter to the United States Navy and this agency directed her movements (A 117). The master of the S.S. AMERICAN EAGLE had received a radio message (Ex. I, A 210) informing him that the regular engineer was to rejoin the vessel at Ras Tanura on or about May 20, 1972 (A 121). Upon arrival at Ras Tanura the vessel's agent came aboard and informed the master that arrangements had been made for the arrival of the regular engineer and the repatriation of Gilbert (A 127). Sometime early in the morning on May 20, 1972, the master initiated the discharge procedure aboard the vessel since no U.S. Consul was available at Ras Tanura and paid off in the manner that Gilbert requested, $2,000.00 cash and a voucher for the balance (A 128; 131; 229) He was given a first class airline ticket from Dhahran, the nearest commercial airport to Ras Tanura, back to New York, his port of engagement (A 126-7; 132).

The only witness to testify on behalf of Gilbert in the court below was Mr. Gilbert. He testified on direct examnation that he requested the balance of his wages in cash rather than the voucher from the master but the master allegedly refused to get it to him (A 52). On cross-examination however, he admitted to having testified at his deposition that the master had said to him if he wanted cash he (the master) would give Gilbert cash (A 82). In addition, the master who testified at trial stated that Gilbert did not ask for the remainder of his wages in cash and that the master paid him the cash that he wanted and gave him the voucher that he requested, for the remainder. The master specifically testified that Gilbert did not ask him for his total payoff in cash (A 130-31; 229). At the time of his payoff Gilbert told the master that he wanted to see an American Consul in Ras Tanura to get his disputed

overtime claim settled. The master told him that there was no American Consul in Ras Tanura for him to see (A 128). In addition, the master told Gilbert that there was a grievance procedure provided in his union agreement to take care of disputed overtime claims (A 129). As will be shown below, Gilbert took full advantage of this procedure. Gilbert also testified that he asked the master to carry him aboard the vessel to the next port (A 54). However, the master testified that he did not recall such a request (A 129). The court below stated that the central issue of whether or not a tender of wages had been made at the time Gilbert left the vessel was a question of fact (A 183-4) and as the opinion of the court below indicates, the court believed the testimony of the master (A 229).

Gilbert did not utilize the first-class airline ticket given to him upon his departure from the vessel but rather returned to New York by way of Bombay, Taipei, Tokyo, remaining two months in Yokohama and finally proceeding to San Francisco, Reno and New York. In addition, he remained a period of time in both San Francisco and Reno for certain business purposes (A 76). Upon his return to Japan, Gilbert sent the original of his pay voucher (Ex. 2, A 189) to his union and did not receive it back until March, 1973 or approximately ten months later (A 85). Gilbert also claimed to have made a demand for his wages from the Shipowner's agent in Yokohama (A 58-9) however, Gilbert did not even have the original of his pay voucher according to his own testimony, having mailed it to the union (A 59). The Shipowner's Vice President in charge of operations, Capt. Marshall, also testified that in a subsequent conversation with the agent no mention of a demand for wages by Gilbert was made.

After arriving in New York in July, 1972, Gilbert and his union representatives embarked upon negotiations dealing with the settlement of the disputed overtime claim in accordance with the collective bargaining agreement and which amounted at most, to approximately $450.00. De-

spite the fact that Gilbert went to the Shipowner's offices with his union representatives to discuss the overtime claim on August 22, 1972, there was absolutely no discussion concerning Gilbert's balance of wages due. Gilbert did not mention it nor did he even present his pay voucher. The meeting dealt strictly with his overtime claim (A 155). There were several meetings and an exchange of correspondence between the Shipowner, the union and Gilbert concerning the overtime claim (A 149-60; 190-200; 211-27). The union, on behalf of Gilbert, at the end of these protracted negotiations, agreed that Gilbert was entitled to a total of $76.14 for the disputed overtime. In fact, the Shipowner's Vice President testified at trial that this payment was made as a gesture (A 160) since they felt that he was not entitled to any payment at all. A check for the $76.14 was sent to the offices of the union on or about March 28, 1973.

Gilbert, apparently unsatisfied with his union's efforts, instituted the current litigation by filing a complaint on May 18, 1973 (A 3-32). Up to this time Gilbert had never made any effort to obtain the balance of wages due him and, in fact, only obtained his voucher which he had surrendered to the union ten months before, in March, 1973. Despite the fact that Gilbert had specifically been told by his own union in 1972 that his wages were available at the company's office and to go down and get them (A 88), he never made any attempt to secure payment of the wages. The answer on behalf of the Shipowner (A 33-42) was served and filed with the court on June 18, 1973. On July 11, 1973 (Ex. F, A 205-06) counsel for the Shipowner again tendered payment of the balance of wages to Gilbert without prejudice to any rights in the pending litigation, with a carbon copy to the District Judge. No reply was received. Upon the introduction into evidence of this letter, the court below indicated that it would not consider any claim for double wages under 46 U.S.C. 596 subsequent to that date.

Gilbert's deposition was taken at Shipowner's counsel's office on July 25, 1973. A conference had previously been held before Magistrate Jacobs upon reference by the District Judge and a discovery schedule had been established by the Magistrate.

On January 29, 1974 a motion to dismiss certain of the causes of action in the complaint was filed by Shipowner and on April 30, 1974 Opinion No. 40654 was filed by Judge Metzner dismissing the second, third and seventh through sixteenth claims of the plaintiff.

The action was tried before the court without a jury on December 5th and 6th, 1974. During the trial and after Gilbert completed his case in chief, the Shipowner conceded that, based upon the fact that Gilbert had not left the vessel at noon on May 20, 1972 as originally intended but had been delayed until later in the day, he was entitled to an extra day's pay and subsistence to cover travel time (A 114-16). This was in the amount of $46.32 which the court below awarded in its judgment (A 231-2).

Subsequent to the entry of judgment and as conceded by Gilbert in his brief (Brief, p. 9), Gilbert appeared before the United States Shipping Commissioner in New York, completed the signing of procedure, and received the balance of his wages due upon the presentation of his pay voucher.

In its opinion, the court below held that Gilbert had been properly paid off on the vessel and that his term of employment had ended. The Court held that Gilbert had been paid in the cash and voucher combination that he desired. In addition, the court below held that Gilbert had never made any attempt to go to the Shipowner's office with his voucher to collect the balance of wages due. The court held that there was no violation of 46 U.S.C. Sec. 596 and further that there was no violation of 46 U.S.C. Sec. 685 in that not only was there no consular officer avail-

able but also that the overtime dispute claimed by Gilbert was a matter that was adequately covered by his collective bargaining agreement. It was held that Gilbert's attempt to come within the meaning of Sec. 685 failed because there was no evidence of cruel treatment within the meaning of that section. Finally, the court below held that the overtime claim had been disposed of by the union on behalf of Gilbert and that the sum of $76.14 had been paid by the Shipowner to the union on behalf of Gilbert.

Summary of Argument

The court below was correct in holding that there was no violation of 46 U.S.C. Sec. 596. Gilbert's full wages were unconditionally and unequivocally tendered to him on the day he left the vessel and therefore, 46 U.S.C. Sec. 596 never came into operation. Even if the master unjustifiably refused to take Gilbert to the United States Consul, which the court below held not to have been the case, this does not amount to a violation of 46 U.S.C. Sec. 596. Even after Gilbert left the vessel, there was never any willful, arbitrary or capricious neglect or refusal to pay wages on the part of the Shipowner. The Shipowner was always ready, able and willing to pay the balance of wages due. Gilbert, however, by his own deliberate actions failed to even present the pay voucher for payment. Gilbert deliberately made no efforts whatsoever to secure payment of the balance of his wages since he was unhappy with his union's handling of his alleged overtime claim and subsequently claimed that there had been a refusal to pay his wages.

The court below was correct in holding that Gilbert had chosen to have his union negotiate his alleged overtime dispute pursuant to the collective bargaining agreement and that the union on his behalf had disposed of the claim for the payment of $76.14 by the Shipowner.

There was no reversible error committed by the court below in failing to enter judgment for the balance of wages due. In view of the fact that Gilbert has been paid this amount the issue is now moot.

POINT I

The court below was correct in holding that there was no violation of 46 U.S.C. Sec. 596 (the double wage statute) and therefore, the Shipowner was not liable for any penalty under that section.

The relevant statutory provision provides in part:

> "Sec. 596. Time for payment.
>
> The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court * * *"

As will be shown below, there was never any refusal or neglect to make payment within the meaning of the stat-

ute. Even where there has been an unlawful withholding of wages, which is certainly not the case here, this in and of itself does not amount to an absence of sufficient cause within the meaning of the statute. *Swain* v. *Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966); *McConville* v. *Florida Towing Corp.*, 321 F.2d 162 (5th Cir. 1963). In interpreting the statute and particularly the "refuses or neglects to make payment . . ." portion, it has been held that the section confers no right to recover double wages unless the delay was in some sense arbitrary, willful or unreasonable. *Conte* v. *Flota Mercante del Estado*, 277 F.2nd 664 (2d Cir. 1960). When the above standards are applied to the facts and circumstances as set forth in the evidence before the court below, it is clear that the District Court was correct in its holding that there was no violation of 46 U.S.C. Sec. 596.

a. Gilbert's full wages were unconditionally and unequivocally tendered on the date Gilbert left the vessel at Ras Tanura.

The two parties to the relevant conversation in the master's cabin on the day that Gilbert left the vessel, testified in open court. Gilbert himself testified. He testified on direct examination that on the day he left the vessel he was given $2,000 in cash and a voucher (Ex. 2, A 189) for the balance of wages due him in the amount of $5,121.19 (A 52). He also testified that he allegedly requested the balance in cash at the same time (A 52) and that the master refused to pay him the cash, telling him that he could get the balance of his cash in New York (A 52). On cross-examination, however, Gilbert admitted to having been asked the following question and having given the following answer at the time of his deposition:

> "Q. Now, on that day did the master offer you cash or a voucher?
>
> A. He said if I wanted cash that he would give me cash." (A 82)

In addition to Gilbert's admission on cross-examination, the master clearly and unequivocally testified that he gave Gilbert the cash that he wanted and the balance in the form of voucher which he also wanted (A 130-31). He was not even cross-examined on this point. In response to a direct question by the court the master testified that Gilbert did not ask for the rest of his money in cash. He did not ask for the total payoff in cash but specified the amount, $2,000.00, that he wanted in cash (A 130-131). The court at the close of the evidence indicated that it wanted a post-trial brief only on the issue of the obligation to take a seaman to a United States Consul, indicating that the remaining issues in the case were solely questions of fact for the court (A 183-4). Gilbert's counsel requested and received permission also to brief the issue of double wages.

It is clear from the comments and opinion of the court below that the issue of whether or not Gilbert was offered his wages on the day he left the vessel was a question of fact (A 229). The court below found as a finding of fact and with both witnesses testifying in open court that Gilbert asked for $2,000 which he received, and asked for the balance of his wages in a form of a voucher, which he also received. It is incumbent upon Gilbert to show that this finding by the court below was clearly erroneous. This Gilbert has not and indeed cannot show to this court.

Gilbert admits in his brief (Brief, p. 13) that "failure or neglect to meet this statutory mandate (referring to Sec. 596) as to time of payment without sufficient cause . . ." requires the payment of the penalty. The Shipowner while not conceding that this is the sole standard to be applied, nevertheless submits that even on Gilbert's view of the law, it is clear that there was no statutory violation. It is obvious that there was sufficient cause not to pay the full wages in cash since Gilbert himself did not want the wages paid in that manner. He was given what he requested.

Gilbert adopts the novel argument in his brief (Brief, p. 12) that it is immaterial that a seaman consents to be paid off a vessel and elects to take payment of his wages in the form of a voucher. Significantly no authority is cited in support of this argument.

The standard to be applied by this Court in reviewing the finding of the court below that Gilbert was offered his full wages in cash when he left the vessel is set forth in *McAllister* v. *United States,* 348 U.S. 19, 21 (1954), as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous * * *. A finding is clearly erroneous when * * * 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed' ".
>
> See also, *United States* v. *Oregon Medical Society,* 343 U.S. 326 (1952); *United States* v. *United States Gypsum Co.,* 333 U.S. 364 (1948).

The failure or neglect to make payment must occur within the time period specified in the statute or else no cause of action accrues under 46 U.S.C. Sec. 596.

In *McCrea* v. *United States,* 294 U.S. 23 (1935), the Supreme Court held that unless the failure or neglect to make payment occurred *within the periods specified in the statute,* no cause of action for penalties accrued. The Court said:

> "But the liability is conditioned by the statute upon the refusal or neglect to pay wages 'in the manner hereinbefore mentioned without sufficient cause'. The quoted phrase refers to the specified periods within which the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, with-

> out sufficient cause, to pay the wages within the prescribed period. * * *
>
> Thus liability for double wages accrues, if at all, from the end of the period within which payment should have been made. *It must be determined by the happening of an event within the period,* failure to pay wages without sufficient cause. The statute affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are *unreasonably* withheld. 294 U.S. at 31-32." (Emphasis supplied.)

With respect to Gilbert's decision not to accept the full wages in cash as tendered, the Court in *McCrea* v. *United States* had the following to say concerning the availability of penalties under 46 U.S.C. Sec. 596:

> "But it affords no basis for recovery if, by his own conduct he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it." 294 U.S. at 32.

In *Mavromatis* v. *United Greek Shipowners Corp.,* 179 F.2d 310 (5th Cir. 1949), a case cited by Gilbert in his brief (p. 24), the court held that where there is a rejection of tender by a seaman, no penalties under 46 U.S.C. Sec. 596 accrue. An unconditional tender, such as was made by the Shipowner in this case, prevents the statute from coming into operation. *Rickson* v. *Velazquez,* 46 F.2d 262 (4th Cir. 1931).

Norris, The Law of Seamen, Sec. 388 states the rule succinctly:

> "The refusal of a seaman to accept all of the wages due him at the time of his discharge will not justify a double wage penalty."

There has not and indeed there could not be any question raised about Gilbert's capacity or ability to make a decision not to accept his full tendered wages in cash when he left the vessel.

b. An unjustified refusal by the master to take Gilbert to a United States Consul, which Gilbert failed to prove in the court below, is not a violation of the provision of 46 U.S.C. Sec. 596 (the double wage statute).

Realizing that the Shipowner has fully complied with the provisions of 46 U.S.C. Sec. 596, Gilbert argues that the alleged failure of the Shipowner to take Gilbert to a United States Consul as provided in 46 U.S.C. Sec. 682 somehow amounts to a withholding of payment "without sufficient cause" under Sec. 596 (Brief Point I). In addition to completely overlooking certain of the facts in the record, Gilbert cites no authority in support of this novel argument. Indeed, there is no authority to support this position. *Isbrandtsen* v. *Johnson,* 343 U.S. 779 (1952), cited by Gilbert (Brief, p. 13) deals with a factual situation where there was an affirmative set-off by the owner for medical expenses incurred on behalf of the seaman. *Miner* v. *Harbeck,* 17 F. Cas. 437, No. 9629 (1849), (Brief, p. 15) is likewise inapplicable in that the owner was urging mutual consent as a defense. Here, there is no question that Gilbert's term of employment had ended, the regular engineer was returning and Gilbert was being flown back to New York, his port of engagement, at the Shipowner's expense (A 74-5; 121; 126-7; 132; 228-9; 231). *Ennis* v. *Waterman S.S. Corp.,* 49 F. Supp. 685 (S.D.N.Y. 1943) (Brief, p. 15) is a case wherein the double wage statute, 46 U.S.C. Sec. 596, was not even an issue before the court.

Prior to a further discussion of Gilbert's erroneous view of the law, there are certain facts found in the court below refuting Gilbert's argument, which should be directed to the court's attention.

The master testified at trial (A 128) and the court in its decision held (A 229), that there was no consular officer at the port of Ras Tanura. Since the consular officer was not available, the payoff was made by the master (A 131-2; 229). In addition, it was not until shortly before he was to be paid off that Gilbert for the first time, despite some five months aboard the vessel, requested to see the United States Consul (A 128). Gilbert argues in his brief that the court below was clearly erroneous in its finding that a Consul was not available at the time of Gilbert's discharge (Brief, p. 15) yet there was no contrary evidence in the record to rebut that of the master that there was no consular officer available. Gilbert in his brief cites to the cross-examination of the master (A 142-7) in support of his contention that a consular officer was located in Dhahran which was approximately one hour's drive from the port of Ras Tanura, yet nowhere in that examination does Gilbert's own counsel ask the master if the consul would even had been available. In fact, the Saudi officer referred to by Gilbert (Brief, p. 15) was a situation where the master testified that a narcotics problem was serious enough that it was arranged for him to see the American Consul on a prior voyage (A 146-7). Gilbert himself testified on direct examination as to the difficulty in even leaving the dock area in Ras Tanura (A 53). The fact that the master was advised by radio two days prior to arrival in Ras Tanura provides no assistance to Gilbert in its argument (Brief, pp. 15-16) since he did not request to see the Consul according to his own testimony until shortly before he was scheduled to leave the vessel.

Gilbert also argues that the court below was in error as a matter of law in finding that a Consul was not available (Brief, p. 15). However, the Shipowner submits that this finding was purely a finding of fact by the court below and is subject to the "clearly erroneous" test upon review by this court.

The record is clear that the only issue that Gilbert wished to bring to the attention of a Consular officer was his alleged overtime claim (A 128). The court below in its opinion found this to be the case (A 229; 231). Based upon this finding, the court below held that pursuant to 46 U.S.C. Sec. 685 this was a matter which was adequately covered by the collective bargaining agreement and therefore, was not a matter that would be considered by the Consul (A 231). Not only did the master testify to this effect (A 128-9) but also the section of the Code of Federal Regulations cited by Gilbert in his brief, Section 82.17 CFR supports this finding of the court below.

Gilbert also fails to address himself to Exhibit E (A 204) which is a letter from a United States Consular Officer in response to an inquiry by Gilbert. This letter specifically states that seaman can be signed on and off vessels at Ras Tanura without the presence of Consular officials.

There is simply no authority to support Gilbert's contention that an alleged violation of 46 U.S.C. Sec. 682 amounts to a refusal to pay wages without sufficient cause within the meaning of 46 U.S.C. Sec. 596. Despite the claim that there is a "statutory scheme" for the protection of seaman, there is no justification for failing to read the wording of the particular statutes themselves.

As the Supreme Court stated in *McCrea* v. *United States,* 294 U.S. 23 (1935) there is a specific condition precedent to the operation of 46 U.S.C. Sec. 596. There must be a violation of that condition precedent within the specified periods in the statute before a cause of action for the penalties can accrue. Gilbert, realizing that there was no such violation and that by his own action he refused the tender of his full wages in cash, is forced to argue that since payment was not made before a United States Consul, this amounted to a failure to make payment without sufficient cause. There is simply no support for this argument.

At most, a cause of action for wrongful discharge might lie. The measure of damages however is not the double wage penalty provided in Section 596. The measure of damag the wages that the seaman would have earned had the shipping contract being completely fulfilled. Norris, The Law of Seamen, Sec. 482 at 561. In the present case even were the discharge wrongful, which the Shipowner does not concede, Gilbert's employment had terminated in any event on the day he left the vessel since he had completed his relief job and full wages were tendered for the entire term of employment. The court below in its order dated April 29, 1974 dismissing certain of the causes of actions herein, held that the measure of damages, if any, for a willful action in refusing to take a seaman before a United States Consul creates a cause of action for the relief that the seaman could have obtained from the Consul (A 47-8). Under 46 U.S.C. Sec. 682, the only relief that the Consul can give is the payment of wages due to the seaman. In fact, Sec. 82.17 CFR cited by Gilbert (Brief, 2a), specifically provides that the whole or portion of the wages may be taken in the form of a voucher. Under 46 U.S.C. Sec. 685, which the court below held to be specifically inapplicable (A 231), the only relief available by the Consul is the award of an additional month's wages. The court below held that the overtime claim alleged by Gilbert did not fall within the terms of that statute (A 231) and Sec. 82.17 CFR cited by Gilbert (Brief, 2a) affirms the court's holding that these matters are settled pursuant to collective bargaining agreements.

As long as there has been a tender of wages, such as in the present case, notwithstanding the fact that there has been a wrongful discharge, which we again stress is not the situation here, there is no liability for the double wage penalty under Section 596. *Ladzinski* v. *The Sperling S.S. and Trad. Corp.*, 300 F. Supp. 947 (S.D.N.Y. 1969); *Trent* v. *Gulf Pacific Lines*, 42 F.2d 903 (S.D. Tex. 1930).

Gilbert in his brief simply fails to show to this court that there was a willful, arbitrary or unreasonable refusal or neglect to make payment within the period set forth in the double wage statute. The Shipowner submits that the holding of the court below that there was no violation of 46 U.S.C. Sec. 596 must therefore be affirmed. Once tender of all wages due is made, 46 U.S.C. Sec. 596 is inapplicable and there is no obligation on the part of the Shipowner to make a subsequent tender of wages. As the record below indicates, Gilbert surrendered his voucher to his union and did not obtain it back for a period of approximately ten months after he left the vessel (A 85). Obviously during that period Gilbert could not have attempted to obtain the payment of the balance of his wages. The statement in Gilbert's brief (p. 44) that he made his demand for the balance of wages "loud and clear" is totally unsupported by the record and indeed there are no citations to the record in the brief to support that statement. Not only did he fail to mention the wages at the meeting concerning his overtime claim (A 155) but also, despite the advices of his union that the wages were available at the Shipowner's office in New York and to go get them, he failed to make any attempt whatsoever to secure payment (A 88). Once again, by certified letter dated July 11, 1973 (Ex. F, A 205-06) he was again informed that the wages were available at the offices of the Shipowner and would be paid then without prejudice to any claims or rights that he might have in the pending litigation. Again, Gilbert did nothing. In fact, the court below at post-trial argument in referring to Gilbert's alleged efforts to obtain his wages, stated as follows:

> "The Court: But at no time did he do anything. I am led to believe he never intended to do anything. Here you get a letter from the attorney telling you to come down, the wages are there, and doesn't move."

In post-trial argument the court below indicated its incredulity (A 176-85) that Gilbert could contend that

he had made repeated attempts to obtain payment of wages. The court referred to the meetings and extensive correspondence between the Shipowner and Gilbert's union leading to the settlement of his $450 overtime claim and that on not one single occasion did Gilbert ever make a demand for his wages.

Once unconditional tender of wages has been made by the Shipowner, there is no obligation to renew that tender absent a direct demand for payment by the seaman. *Rickson* v. *Velazquez,* 46 F.2d (4th Cir. 1931). The court therein stated the rule succinctly:

> "Having once made a proper tender, the Captain of the ship was certainly under no obligation to repeat the tender in the absence of a direct demand for payment * * *" 46 F.2d at 262.

The record is clear and the court below found, that Gilbert had never presented himself with his voucher to collect the balance of his wages (A 230).

c. Gilbert has failed to prove that there was any unlawful, arbitrary or capricious neglect or refusal to pay wages on the part of the Shipowner after he left the vessel.

As pointed out previously, Gilbert never made any effort whatsoever to collect the balance of wages due. The reference by Gilbert in his brief (pp. 17-18) to the meeting on August 22, 1972 provides no support for his contentions. As the Shipowner's Vice President testified (A 155), and as the court below found (A 230), there was no discussion whatsoever concerning Gilbert's wages and obviously no demand was made. In fact, Gilbert admitted on direct examination that wages were not discussed because his own union's representatives told him not to raise the issue at that meeting (A 61). It is submitted that Gilbert deliberately did not make any attempt whatsoever to collect his wages since he wanted to see what would be the result of

his alleged overtime claim. When he discovered that the overtime claim was not being settled to his satisfaction and when the agreed settlement of $76.14 was sent to his union on or about March 28, 1973, he was clearly dissatisfied and commenced the present litigation on May 18, 1973. It was only at that time that the allegation of willful refusal to pay wages was made for the first time.

Realizing the predicament that he is faced with in view of his failure to make any effort to collect the balance of wages and realizing that the law requires the seaman to exercise diligence in the pursuit of his claim, *Ventiadis* v. *C.J. Thibodeaux & Co.*, 295 F. Supp. 135 (S.D. Tex. 1968), Gilbert then shifts his argument to another tack. He argues first, that the Shipowner should have forced Gilbert to take his wages (Brief, pp. 18-19), but can cite no authority to this effect. Finally it is alleged that even if Gilbert had made an attempt to collect his wages there would have been imposed an alleged improper condition on such payment (Brief, pp. 20-25).

With respect to the first of these arguments, it is obvious why no authority can be cited. There is simply no authority requiring the Shipowner to force Gilbert to take the balance of his wages. The case of *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F.2d 310 (1st Cir., 1949), cited by Gilbert (Brief, p. 24), is destructive of his position since the court there held that there was no penalty where the seaman's rejection of tender precluded payment. This principle had been earlier set down by the Supreme Court in *McCrea* v. *United States*, 294 U.S. 2[illegible] (1935).

With respect to the second argument, Gilbert fails to show that the requirement of appearing before a Shipping Commissioner in New York prior to completion of payment in New York is arbitrary, willful and unreasonable neglect to make payment on the part of the Shipowner. *Conte* v. *Flota Mercante De Estado*, 277 F.2d 664 (2nd Cir. 1960).

There was clear and unequivocal testimony at trial by both the master (A 135-6) and by the Shipowner's paymaster (A 106-07) that the master initiated but did not complete the signing off procedure of Mr. Gilbert. The testimony of the paymaster in response to a question by the court was that in order to complete the procedure the Shipping Commissioner counter-signs Gilbert off the vessel and the Shipping Commissioner issues a certificate of mutual release on the strength of the man's pay voucher and the discharge form that he received on the vessel (A 106-07). Gilbert called no witnesses in rebuttal and this testimony remains unrebutted. The authority cited by Gilbert in his brief in support of his contention that the discharge was completed when Gilbert left the vessel simply does not support his argument. The section from Norris and the *McAvey* case (Brief, p. 21) do not stand for the proposition that, in the present case where the Consul was not available and where there is clear testimony that the master only initiated the process, the discharge was completed at that time.

Gilbert argues that the requirement of the completion of the signing off procedure is unwarranted and unreasonable conduct (Brief, p. 22). The section from Norris cited by Gilbert in support of that argument does not support his contention. In fact the section cited states in part that the phrase "without sufficient cause" has been defined by the Admiralty Courts as ". . . arbitrary, unwarranted, unjust and unreasonable conduct". Norris, The Law of Seamen, Sec. 385 at 462. Likewise, the cases cited by Gilbert fail to support his argument. In the *Forster* case (Brief, p. 22) the Shipowner was apparently trying to discharge a seaman who did not want to leave the vessel and therefore, refused to consent to his discharge. In addition, the court there found that there was a subsequent failure to pay wages upon demand by the seaman.

Gilbert argues that the completion of the signing off procedure was a condition that was allegedly not present if

Gilbert has chosen to take his full wages in cash when leaving the vessel. The record simply does not support this contention. The testimony of the master on cross-examination by Gilbert's counsel was that whenever a man was paid off when an American Consul was not available the process was only initiated by the master (A 135). A reading of that portion of the record (A 136) cited by Gilbert in his brief (p. 22) shows that the master responded to a question concerning Gilbert's entitlement to full wages at the time he left the vessel. The master did not testify that the signing off procedure would be any different and indeed Gilbert's counsel did not ask him this question. The argument that Gilbert was allegedly not advised of this procedure until the time of trial is ingenuous. Not only had he been going to sea for many years, he also never made any attempt to collect his wages, although available to him from the date of his departure from the vessel.

In his brief Gilbert admits that where a seaman is discharged in the United States, 46 USC Sec. 641 provides for the signing of the mutual release form before a United States Shipping Commissioner (Brief, p. 21). The master testified that Gilbert had to appear before either a United States Consul in a foreign port or a United States Shipping Commissioner in a United States port to complete the signing off procedure (A 135). Gilbert who shipped out of New York for the subject voyage and who was given a first class airline ticket to return to New York when he left the vessel, had to complete the signing off procedure before the United States Shipping Commissioner in New York within the provisions of 46 USC Sec. 641 before the signing off procedure would be completed. This court in *Nelson* v. *Moore-McCormack Lines Co.*, 297 F.2d 936 (2d Cir. 1962), has specifically held that conditioning the payment of wages upon the obtaining of a mutual release form from the United States Shipping Commissioner is not a violation of 46 USC Sec. 596 and therefore, does not make the Shipowner liable for the double wage penalty. The court in

that opinion also affirms the procedure whereby the seaman can sign the documents "under protest" thus preserving any rights that he might have. Gilbert was well aware of the "under protest" procedure and he testified on cross-examination (A 89) that he signed the documents on the vessel "under protest." When asked on cross-examination about the certificate of discharge (Ex. 1, A 188), the master testified that he was not acting in the capacity of the Shipping Commissioner when he signed the document and explained the completion of the signing off procedure (A 134-6). Gilbert failed to prove that the requirement of the completion of signing off before the Shipping Commissioner and the obtaining of the certificate of mutual release under 46 USC Sec. 641 was "unwarranted and unreasonable conduct and bad faith" as contended in his brief (Brief, p. 22).

The next line of attack adopted by Gilbert is an allegation that, as of the service of the complaint in this action, the wages should have been paid to Gilbert or deposited in the registry of the court (Brief, pp. 23-24). Yet, in each of the cases cited in support of the latter contention (Brief, p. 24) the facts were such that the penalty had already commenced to run and the payment into the registry was made in order to stop the running of the penalty. In the present case, the penalty never commenced to run and therefore there was no need to deposit the wages with the court. Gilbert also ignores the unequivocal tender of wages made by letter dated July 11, 1973 (Ex. F; A 205-206). The attempt to get around that tender by claiming that Gilbert would still have had to complete the signing off procedure before the Shipping Commissioner must fail since Gilbert never made any attempt to do anything to obtain payment of the wages. Despite the advices of his union as early as 1972 that his wages were available at the company's office and to get down and get them (A 88) and despite the fact that as late as July 11, 1973 he was

again tendered the wages, he never made any effort to obtain payment.

Norris, The Law of Seamen, Sec. 386, summarizes the meaning of "without sufficient cause":

> "Where the master or owner has acted in a reasonable manner throughout and without any showing of arbitrariness or unjustness, where he had an honest doubt as to the justification of the demand, and where the facts and circumstances surrounding the wage demand are susceptible to an honest doubt as to the justness of the seaman's demand, it cannot be said that the refusal is without sufficient cause.
>
> * * *
>
> Lack of good faith upon the part of the seaman has also been taken into consideration in determining sufficient cause."

The shipowner has proven throughout this case that it acted reasonably and in good faith. The court below found on the testimony and evidence before it that "there was no failure on the part of defendant to pay wages so as to make it liable for the double payment provided by 46 USC Sec. 596" (A. 230).

The Shipowner submits that there was never any withholding of wages within the sense of a refusal to pay and that in any event it has demonstrated good faith and a lack of arbitrary or unreasonable conduct throughout. Gilbert simply has not shown to this court that there was any error in fact or in law on the part of the court below in holding that there was no violation of Sec. 596. Gilbert's own action throughout this entire matter demonstrates a concocted story of an alleged failure to pay wages when he became dissatisfied with his union's settlement of his disputed overtime claim.

POINT II

The court below was correct in holding that Gilbert's overtime claim has been disposed of by the payment of $76.14 by shipowners.

Gilbert in his brief makes the argument that the only evidence concerning the settlement of his overtime claim was the testimony of the Shipowner's Vice President that after the protracted negotiations, meetings and exchanges of correspondence, the union authorized the settlement in the amount of $76.14 (Brief, pp. 25-26). This argument misses the point since it was Gilbert himself who chose to have his union represent him and handle this dispute under the collective bargaining agreement. Not only did Gilbert personally participate in the August 22, 1972 meeting but also he was requested to and did write a letter in response to a letter written by the Shipowner as late as November 27, 1972 (Ex. N; A 218-27). What Gilbert is now trying to argue before this court is that the extensive amount of time and effort expended by his union on his behalf and by the Shipowner in the resolution of his overtime claim should have been disregarded by the court below.

By agreeing to submit this dispute to the collective bargaining process Gilbert agreed to be bound by the outcome of that process. The authority cited by Gilbert concerning seaman's releases is completely inapposite. This is not a case involving a release nor a settlement by a seaman with a shipowner. This is a case of a seaman's labor union negotiating a claim under the collective bargaining agreement on behalf of the seaman with the Shipowner. There can be no doubt that Gilbert chose this procedure because he felt that the union was powerful enough to protect his interests. Simply because he was unsatisfied with their efforts is no reason for this court to hold that the court below was in error in its finding that the

overtime claim had been disposed of on his behalf by his union. The remedy for Gilbert, if any, lies not against the Shipowner, but against his own union.

United States Bulk Carriers, Inc. v. *Arguelles,* 400 U.S. 351 (1971), cited by Gilbert in his brief (p. 25) is particularly significant with respect to this issue. The Supreme Court in affirming the Fourth Circuit held that, while the collective bargaining grievance procedure is not a *mandatory* substitute for statutary rights, nonetheless, it is a substitute and the seaman can elect to proceed in that manner. In fact, Justice Douglas who wrote the majority opinion confirms that the collective bargaining grievance procedure is an *optional remedy* to the seaman, 400 U.S. at 358. To hold that Gilbert may elect the collective bargaining procedure and then when he is dissatisfied with the results, turn around and assert a cause of action on the same facts, hoping for a better result, would render the collective bargaining agreement procedure a nullity and would give to Gilbert two bites of the proverbial apple. In fact, Norris, The Law of Seamen, Sec. 323, states:

> "The matter of overtime labor is largely governed by collective bargaining agreements entered into between the seaman's union and the ship's owners."

In addition, Sec. 83.2 CFR instructs consular officials not to become involved in disputes covered by collective bargaining agreements and instructs those officials that most of these disputes are settled pursuant to the settlement provisions of collective bargaining agreements.

The fact that Gilbert never cashed the $76.14 check is of no relevance since he agreed to have his union resolve his dispute and is bound by their agreement on his behalf.

The court below was correct in its finding that the overtime dispute had been resolved by the payment of $76.14 (A 230).

POINT III

The omission by the court below to grant judgment to Gilbert in the amount of $5,121.19 is a moot issue since these wages have been paid to Gilbert.

Gilbert admits in his brief that on April 18, 1975 he was paid the earned wages pursuant to his pay voucher in the amount of $5,121.19.

This issue has become moot during the pendency of this appeal and has, therefore, become subject to the judicial inhibition against deciding moot causes. See generally 6 A Moore's Federal Practice, Par. 57.13.

CONCLUSION

The judgment of the court below should be affirmed in all respects.

Respectfully submitted,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Defendant-Appellee
96 Fulton Street
New York, New York 10038

ROBERT J. RYNIKER
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN THEODORE GILBERT,

Plaintiff-Appellant,

against

AMERICAN EAGLE TANKER CORP.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of September 1975 he served two copies of the Brief for Defendant-Appellee on Donald D. Olman, Esq.

the attorney for the Plaintiff-Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 276 Fifth Avenue, New York ( ) N. Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

26th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976